Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

B. WILLIS, C.P.A., INC.,
Petitioner,

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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May 3, 2007

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QUESTIONS PRESENTED

Is there a procedural due process right to a predeprivation hearing in a state eminent domain case when the landowner challenges the public use of the taking?

Does the federal preemption set forth in 49 U.S.C. § 10501 preclude condemnation under state eminent domain law of either raw land for a railroad right of way or an existing railroad track and bridge?

PARTIES TO THE PROCEEDING

Petitioner

B. Willis, C.P.A., Inc., is a professional corporation wholly owned by Buck Willis, C.P.A. It has no subsidiaries.

Respondent

Public Service Company of Oklahoma is a wholly owned subsidiary of American Electric Power, Inc. a publicly traded electric utility holding company.

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OPINIONS BELOW

The decision of the Oklahoma Court of Civil Appeals (2007 OK CIV APP 18, ___ P.3d ___) was issued on September 19, 2006 and is included in the Appendix at Appendix B at 3a. The order of the Oklahoma Supreme Court denying certiorari and ordering the decision of the Oklahoma Court of Civil Appeals released for publication is unpublished and is included in the Appendix at Appendix A at 1a.

JURISDICTION

The Oklahoma Supreme Court issued its order denying certiorari on February 5, 2007. This petition for certiorari is filed within 90 days of that order. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1257 and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article I., Section 8.

The Congress shall have Power...

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

U.S. Constitution, Article VI., Section 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall

be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. Constitution, Amendment 14, Section 1.

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

49 U.S.C., § 10501 b

(b) The jurisdiction of the Board over -
(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

66 O.S. § 53

A. If the owner of any real property or interest therein, over which any railroad corporation, incorporated under the laws of this state, may desire

to locate its road, shall refuse to grant the right-of-way through and over his premises, the district judge of the county in which said real property may be situated shall, upon the application or petition of either party, and after ten (10) days' notice to the opposite party, direct the sheriff of said county to summon three disinterested freeholders, to be selected by said judge as commissioners, and who shall not be interested in a like question.

B. The condemnor shall give notice to a condemnee by personal service or by leaving a copy of the notice at the condemnee's place of residence with some member of his family over fifteen (15) years of age, or by publication in the case of a condemnee who resides out of this state or a resident of this state who has departed herefrom with intent to avoid service of notice, or whose whereabouts or identity the condemnor, or his attorney, upon diligent inquiry is unable to ascertain, or an unknown heir, successor or assign of one in whom some right, title or interest in the property concerned was possessed, by publishing such notice once a week for two (2) consecutive weeks in a newspaper authorized by law to publish legal notices in the county where the petition is filed, the ten-day period to begin with the first publication. A copy of such notice and a copy of the petition shall be mailed to such opposite party's last-known mailing address within five (5) days of the first publication thereof. The procedure for service by publication as authorized herein shall in all other respects be as provided by law for service by publication in civil actions, except summons need not first be issued.

C. The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of the condemnation and they shall assess the just compensation to which said owner is entitled; and they shall forthwith make report in writing to the clerk of the court, setting forth the quantity, boundaries, and just compensation for the property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner; which report must be filed and recorded by the clerk. A certified copy of the report may be transmitted to the county clerk of the county where the land lies, to be by him filed and recorded, without further acknowledgment or proof, in the manner and with like force and effect as is provided for the recording of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.

D. "Just compensation", as used in subsection C of this section, shall mean the value of the property taken, and in addition, any injury to any part of the property not taken. Any special and direct benefits to the part of the property not taken may be offset only against any injury to the property not taken. If only a part of a tract is taken, just compensation shall be ascertained by determining the difference between the fair market value of the whole tract immediately before the taking and the fair market value of that portion left remaining immediately after the taking.

66 O.S. 55

(A) The report of the commissioners may be reviewed by the district court, on written exceptions filed by either party, in the clerk's office within thirty (30) days after the filing of such report; and the court shall make such order therein as right and justice may require, either by confirmation, rejection or by ordering a new appraisement on good cause shown; or either party may within sixty (60) days after the filing of such report file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered in the same manner as civil actions in the district court. If the party demanding such trial does not recover a verdict more favorable to him than the assessment of the commissioners, all costs in the district court may be taxed against him.

(B) Within ten (10) days after the report of commissioners is filed, the court clerk shall forward to the attorney of record for the condemnor, the attorney of record for each condemnee, and to all unrepresented condemnees, a copy of the commissioners' report and a notice stating the time limits for filing an exception or demand for jury trial as specified in paragraph (A) of this section. This notice shall be on a form prepared by the Court Administrator, which shall be approved by the Supreme Court, and shall be distributed to all clerks of the district court by said Court Administrator. If a party has been served by publication, the clerk shall forward a copy of the report of commissioners and notice of time limits for filing an exception or demand

for jury trial to the last-known mailing address, if any, and shall cause a copy of the notice of time limits to be published in one (1) issue of a newspaper qualified to publish legal notices, as defined in Section 106 [25-106] of Title 25. After issuing the notices provided herein, the court clerk shall endorse on the notice form filed in the case, the date and that a copy of the report together with the notice was mailed to each party or his attorney of record, or the date the notice was published in compliance with the provisions hereof.

(C) The time limits for filing an exception and demand for jury trial, as prescribed in paragraph (A) of this section, shall be calculated from the date the report of the commissioners is filed in the case. On failure of the court clerk to give notice within the time prescribed in paragraph (B) of this section, the court, on application of any party, may extend the time for filing an exception to the report or a demand for trial by jury for a period not to exceed twenty (20) days from the date the application is heard.

(D) Where the party instituting a condemnation proceeding abandons such proceeding, or where the final judgment is that the real property cannot be acquired by condemnation or if the award of the jury exceeds the award of the court-appointed commissioners by at least ten percent (10%), then the owner of any right, title or interest in the property involved may be paid such sum as in the opinion of the court will reimburse such owner for his reasonable attorney, appraisal, engineering, and expert witness fees actually incurred because of the condemnation

proceeding. The sum awarded shall be paid by the party instituting the condemnation proceeding.

STATEMENT OF THE CASE

Oklahoma's statutory eminent domain scheme is set out in Title 66 of the Oklahoma Statutes, which is entitled "*Railroads*." These statutes were originally enacted in 1890 by the legislature of the Oklahoma Territory and when the Oklahoma Territory and the Indian Territory were merged in 1907 to become the State of Oklahoma, the territorial statutes simply carried over as the original statutes of the new state.

These statutes contain no statutory procedures for a landowner to contest the taking of his property or challenge the public use of the taking. Rather, as railroad statutes written in the nineteenth century, the statutes merely presume that the taking is for a public use and thus no proceedings on that issue would be necessary. In 1935 the Oklahoma Supreme Court noted, "Condemnation procedure in this state is thus governed by statutes which, under a logical interpretation, contain no provision authorizing a determination of questions relating to the right to condemn." *Wrightsman v. Southwestern Natural Gas Co.*, 46 P.2d 925 (Okla. 1935) at ¶ 32.

However, with the *Transportation Act of 1920* Congress enacted the predecessor to the statute found today at 49 U.S.C. § 10901. Congress thereby established the requirement that a railroad could not be constructed, unless the Interstate Commerce Commission ("ICC"), and today the Surface Transportation Board ("STB"), had issued a certificate of public convenience and necessity.

In *Nicholson v. I.C.C.*, 711 F. 2d 364 (D.C. Cir. 1983) the Court reviewed the legislative history of the Act and noted that Congress found that railroads were being constructed that were not in the public interest as their economic viability was dependent on diverting traffic away from existing railroads.

Although the Oklahoma statutes did not contain any provisions for landowners to challenge the condemnation of their property, the Oklahoma Supreme Court held that landowners had a constitutional right to do so and in *Wrightsman v. Southwestern Natural Gas Co., supra* established by judicial construction that the procedure to exercise that right was to raise the issue as an exception to the report of commissioners.

In *Board of County Commissioners of Creek County v. Casteel*, 522 P.2d 608 (Okla. 1974) the Oklahoma Supreme Court made it clear that filing an exception to the report of commissioners was the only way to raise the issue of the right to take the property and any other pleading would be insufficient to raise the issue. As Justice Hodges noted in his dissent, 66 O.S. 55, the statute that authorizes filing exceptions to the report of commissioners, is only contemplating excepting to the valuation the commissioners assigned to the property being condemned, since, as previously noted, Oklahoma's railroad statutes just assume any taking is for a public use.

In the case at bar, Public Service Company of Oklahoma ("PSO") filed a condemnation proceeding for a railroad right of way across property owned by B. Willis, C.P.A., Inc., ("Willis") in the Rogers County District Court. PSO's lawyers controlled every step of the proceedings including hand picking the commissioners, and drafting both the instructions to the commissioners and the commissioners'

report. Both the report of commissioners and the payment of the amount of the commissioners' award were filed with the Rogers County Court Clerk simultaneously by PSO's lawyers. The next day the court clerk mailed a copy of the report to Willis advising him that now, for the first time, Willis had standing to appear in court to challenge the taking of its property. Willis received this notice two (2) days after PSO had deposited the amount of the commissioners' award with the court clerk and Willis promptly filed exceptions to the report of commissioners challenging PSO's right to take its property.

After PSO's attorneys, one whom was the then President Pro Tempore of the State Senate, engaged in *ex parte* communication with the District Court judge, PSO procured an order denying Willis' exceptions to the report of commissioners on the ground that Willis had no right to even be heard in defense of its property. PSO then seized the property and constructed a railroad bridge and track on the property. Willis then took three actions. Willis sought an immediate writ from the Oklahoma Supreme Court to halt PSO's destruction of Willis' property[1] that the Oklahoma Supreme Court denied. Willis then appealed the trial court's order. This ultimately led to the decision in *Public Service Company v. B. Willis, C.P.A., Inc.*, 941 P. 2d 995. (Okla. 1997). Willis also commenced litigation in the U.S. District Court for the Northern District of Oklahoma, asserting claims brought under 42 U.S.C. § 1983 based on this Court's decision in *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975 (1990) that property owners are entitled to a predeprivation

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[1] To construct its railroad PSO had to make an enormous cut on Willis' property severing and removing not only a large quantity of top soil but extremely valuable deposits of coal and limestone.

hearing. This federal litigation resulted in the decision of the U.S. Court of Appeals for the Tenth Circuit found at Appendix C at 19a.

After the state appeal was remanded to the Rogers County District Court PSO and the Court simply acted as if the decision never existed and continued to ignore Willis' discovery requests. Not until 2000 did PSO produce the documents Willis had been seeking since 1993.

One of the items discovered was that PSO did not have a certificate of public convenience and necessity from either the ICC or the STB even though PSO had notified Willis by certified mail that it was condemning the property as a common carrier and the track was used by full complete unit trains in a continuous through journey.

Willis then filed a declaratory judgment action with the STB seeking a decision that the track required a certificate of public convenience and necessity under 49 U.S.C. § 10901.[2] However, after declaring at the state and local level that it was constructing the track as a common carrier, PSO filed a verified affidavit with the STB denying any common carrier

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[2] Under well developed law a track such as this requires such a certificate even if it is characterized as a "spur line." See *Texas & P. Ry. Co. v. Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266, 46 S. Ct. 263 (1928); *Nicholson v. ICC*, 711 F. 2d 364 (D.C. Cir. 1983)

status for the track[3]. On the basis of this affidavit, the STB declined to assert jurisdiction over the track.

Willis then filed a motion in the Rogers County District Court challenging the jurisdiction of the Court to proceed in the case as a result of the federal preemption enacted by Congress in the ICC Termination Act and found at 49 U.S.C. § 10501. The response of the Rogers County District Court was:

> **"If you want to take that somewhere and see if there is an exception here or you have been, federal courts have taken this all over, and then let them tell me that they have."**

As a result, Willis filed another federal action in the U.S. District Court for the Northern District of Oklahoma including a declaratory judgment claim seeking a decision that the federal preemption precluded a state district court from condemning Willis' property, particularly when a railroad bridge and track had already been constructed and placed in service. In addition, Willis brought claims under 42 U.S.C. § 1983 for seizing its property in violation of its right to due process of law and equal protection of the law and for subversion of the judicial process under this Court's decision in *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 182 (1980). This case is presently on appeal to the Tenth Circuit. It was

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[3] Interestingly, in the recent decision of *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) at 2661 Justice Stevens noted: "On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad **with common-carrier duties** is a familiar example." (Emphasis added.)

fully briefed on June 9, 2006 and argued on November 15, 2006 but no decision has yet issued.

After this federal litigation was commenced, in October of 2004 the Rogers County District Court held a hearing on Willis' challenge to the taking of its property, almost 12 years after PSO filed the "commissioners[4]" report and deposited the "commissioners'" award with the court clerk. On November 15, 2004 the Court signed an order unilaterally prepared by PSO's attorneys denying Willis' exceptions. Willis then appealed this order.

On September 19, 2006 the Oklahoma Court of Civil Appeals issued its decision affirming the District Court. For purposes of this petition for certiorari there were two (2) relevant holdings. First, the Court held that, under Oklahoma law, a landowner's property is taken the instant that the condemnor deposits the commissioners' award with the court clerk. Secondly, the Court held that the STB decision finding that it did not have jurisdiction over PSO precluded application of the federal preemption provisions of 49 U.S.C. § 10501 to the proceedings in the Rogers County District Court.

Willis then filed a petition for certiorari with the Oklahoma Supreme Court. The Court issued an order on February 5, 2007 denying the application and approving the decision of the Court of Civil Appeals for publication and therefore according it precedential value.

When the decision of the Oklahoma Supreme Court under appeal here is read in conjunction with its decision in *Board*

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[4] It was prepared and filed by PSO's attorneys.

of County Commissioners of Creek County v. Casteel, supra., it is clear that Oklahoma eminent domain law allows condemnors to seize property without allowing the landowner any opportunity for a predeprivation hearing. In the case at bar the Oklahoma Supreme Court has held that Willis' property was lawfully taken two (2) days before Willis even had notice that for the first time Willis now had standing to appear in court and challenge the taking of its property that had all ready occurred.

In *Wrightsman v. Southwestern Natural Gas Co., supra.*, at ¶ 24 the Court noted:

> Manifestly, cases might arise, where possession by the condemnor would be tantamount to destruction as far as the landowner is concerned. In such cases denial of a tribunal in which to test the right to condemn prior to possession would be a denial of equal protection of the laws.

Affording a property owner a hearing to contest the taking of his property only after the property has been taken, bulldozed and destroyed is an empty, meaningless, gesture. And as this Court stated in *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 315 70 S. Ct. 652, 657 (1950):

> An elementary and fundamental requirement of **due process** in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and **afford them an opportunity to present their objections...**But when notice is a person's due, **process which is a mere gesture is not due process.** (Emphasis added.)

ARGUMENT FOR GRANTING WRIT

The issues presented in this petition are of great national importance both with respect to eminent domain and the scope of the federal preemption of railroad regulation. This Court has not ruled directly on either issue and state courts have taken advantage of that fact to formulate decisions that are at odds with the this Court's holding in *Zinermon v. Burch, supra.*, and the plain wording of 49 U.S.C. § 10501.

Petitioner is forced to seek relief from this Court because it has exhausted all avenues for relief in the court system of Oklahoma and, when Willis appealed to the U.S. Court of Appeals for the Tenth Circuit in prior litigation, that Court disclaimed any right to a predeprivation hearing in an eminent domain case.

ARGUMENT 1

There is a procedural due process right to a predeprivation hearing in a state eminent domain case when the landowner challenges the public use of the taking.

This court has long held that there is a procedural due process right to a predeprivation hearing whenever the state deprives a citizen of property. Cases this Court has decided have involved replevin, *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983 (1972), asset forfeiture, *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492 (1993) and even a case that did not involve property, *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975 (1990).

However, post *Zinermon* this Court has never directly addressed the issue of a right to a predeprivation hearing in a

case involving the actual physical invasion of real property pursuant to an eminent domain proceeding instituted in a state court. The right to such a hearing is critical given that the power is subject to abuse by politically connected economic interests.

This Court has long upheld the constitutionality of "inverse condemnation" laws. *Yearsley v. Ross*, 309 U.S. 18, 60 S. Ct. 413 (1940). These statutes permitted the seizure of private property without any legal proceedings what so ever and compelled landowners to bear the burden and expense of initiating a court proceeding to obtain compensation for their land.

As this Court has long held that eminent domain may only be used for a public purpose, *Hariston v. Danville & W.R. Co.*, 208 U.S. 598, 28 S. Ct. 331 (1908), *Missouri Pacific Ry. Co. v. State of Nebraska*, 164 U.S. 403, 17 S. Ct. 130 (1896), Oklahoma's railroad statutes just assume that any railroad is a public use. However, as the D.C. Circuit pointed out in *Nicholson v. I.C.C.*, 711 F. 2d 364 (D.C. Cir. 1983), with the enactment of the *Transportation Act of 1920*, Congress had concluded this was not the case.

In the case at bar, on January 27, 1994 Willis appeared before the Rogers County District Court for a hearing on motions to compel discovery and a motion for protective order. At the hearing the Court acknowledged that Oklahoma case law required the Court to adjudicate the public necessity of the taking of Willis' property and both the Court and PSO acknowledged that the Court and PSO's lawyers had engaged in *ex-parte* communication to dispose of Willis' challenge to PSO's right to take the property at that hearing. Subsequently, the Rogers County District Court entered an order holding that Willis had no right to challenge the taking

of its property or even be heard in defense of its property that completely contradicted long-standing Oklahoma and U.S. constitutional law. *Public Service Company v. B. Willis, C.P.A., Inc.*, 941 P. 2d 995 (Okla. 1997).

It is important to understand precisely what the state district court held. As the Oklahoma Supreme Court summarized the holding:

> PSO contended that **discovery for the landowner was irrelevant**. It argued that because it had a legislative grant to condemn property pursuant to 27 O.S. 1991 § 7, **Willis had no right to contest its taking of his land.** The trial court held in favor of PSO... (Emphasis added.) *Public Service Company v. B. Willis, C.P.A., Inc., supra.* ¶5

In the case of *Degen v. United States*, 517 U.S. 820, 828, 116 S. Ct. 1777, 1783 (1986) the Court stated:

> The right of a citizen to defend his property against attack in a court is corollary to the plaintiffs' right to sue there.

In *McVeigh v. United States*, 78 U.S. 259, 20 L.Ed. 80 (1870) the Court stated:

> In our judgment the District committed a serious error...The order in effect denied the respondent a hearing...If assailed there, he could defend there. The liability and the right are inseparable.

This Court has long held that private property may only be condemned for a public use. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S. Ct. 2321 (1984). As public

use is a judicial issue, *Sears v. City of Akron*, 246 U.S. 242, 252, 38 S. Ct. 245, 248 (1918), if the right to judicial review of the public use of a taking "is to serve its full purpose then it is clear that it must be granted at a time when the deprivation can still be prevented." *Fuentes v. Shevin*, 407 U.S. 67, 81, 92 S. Ct. 1983, 1994 (1972).

The reason that a landowner's challenge to public purpose must be adjudicated predeprivation is obvious. As the Oklahoma Supreme Court has observed:

> Manifestly, cases might arise where possession by the condemnor would be tantamount to destruction as far as the landowner is concerned. In such cases, denial of a tribunal in which to test the right to condemn prior to possession would be a denial of equal protection of the laws. *Wrightsman v. Southwestern Natural Gas Company*, supra at 929.

In *Zinermon v. Burch*, 494 U.S. 113, 132, 110 S. Ct. 975, 987 (1990) the U.S. Supreme Court stated:

> In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a post deprivation tort remedy to compensate for the taking.
>
> This Court has repeatedly held that:
>
> The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. To one who protests against the taking of his property without due process of law, it is no answer that to say in his particular case due process of law

would have led to the same result because he had no adequate defense on the merits.

Fuentes v. Shevin, 407 U.S. at 87, 92 S. Ct. at 1997, *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424. 35 S. Ct. 625, 629 (1915).

In *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492 (1993) the Court addressed the constitutionality of the forfeiture of property belonging to a convicted drug dealer. The Court found a violation of the Due Process Clause due to the lack of a predeprivation hearing. The Court rejected claims that no due process violation occurred because a predeprivation hearing would have made no difference, noting:

> Fair procedures are not confined to the innocent. The question before us is the legality of the seizure, not the strength of the government's case. 510 U.S. at 62, 114 S. Ct. at 505.

After this Court's decision in *Zinermon v. Burch, supra.*, the U.S. Court of Appeals for the Eight Circuit rendered its decision in *Hroch v. City of Omaha*, 4 F. 3d 693 (8th Cir. 1993) where in the Court stated:

> Here the State could and in fact did afford Hroch a predeprivation remedy designed to protect his interest as the owner of the property sought to be condemned...After *Zinermon v Burch* *** we think it clear that the constitutional adequacy of this predeprivation remedy may be challenged under § 1983, regardless of whether a post deprivation remedy is also available. *Hroch* at 695

However, when Willis attempted to challenge the constitutional adequacy of the utter lack of a predeprivation remedy afforded Willis under Oklahoma law, the Tenth Circuit responded with the decision found at Appendix C herein.

As a result, this Court should grant certiorari and establish that there is a right under the United States Constitution to a predeprivation hearing to challenge the right to take or public use of a proposed condemnation when state eminent domain powers are invoked.

ARGUMENT 2.

The federal preemption set forth in 49 U.S.C. § 10501 precludes condemnation under state eminent domain law of either raw land for a railroad right of way or an existing railroad track and bridge.

The decision that is the subject of this petition held that the STB decision finding that it did not have jurisdiction over PSO precluded application of the federal preemption provisions of 49 U.S.C. § 10501 to the proceedings in the Rogers County District Court.

However, the application of the federal preemption is dependant not on STB jurisdiction over PSO but rather federal jurisdiction over rail transportation and remedies. While all STB jurisdiction is federal, not all federal jurisdiction is STB jurisdiction. Congress, not the STB, asserts the federal preemption of the regulation of rail transportation and rail operations. As one Court noted:

> It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority

> over **railroad operations**...**Congress** intended the preemptive net of the ICC Termination Act to be broad...**Congress'** use of broad terms...**Congress** specifically denoted its intent to **preempt state regulatory authority of wholly intrastate spur and side tracks** in the same code section...**Congress** proceeded with extreme clarity in making federal jurisdiction over intrastate tracks exclusive in the ICC Termination Act. Thus **Congress's** specificity as to intrastate tracks...There is no basis on which to argue that **Congress** intended to carve out...an exception to its otherwise broad preemption of state regulation of **railroad operations**...With the extension of exclusive federal jurisdiction over wholly intrastate tracks, one of the few railroad matters previously within the jurisdiction of the states, the ICC Termination Act evinces an intent by **Congress to assume complete jurisdiction,** to the exclusion of the states, over the regulation of **railroad operations.** *CSX Transp., v. Georgia Public Service Commission*, 944 F. Supp. 1573 (N.D. Ga. 1996) at 1581, 1582, 1583, 1584 (Emphasis added.)

In *B. Willis, C.P.A., Inc.- Petition for Declaratory Order*, STB Finance Docket NO. 34013 (served October 3, 2001), 2001 WL 1168090 at *1 and *2 the STB stated (Emphasis added.):

> **Rail operations** over the track, supplying trainloads of coal to the power plant commenced in March 1995. The **rail operations** are conducted by BNSF...[T]here is a category of **rail operations** that fall outside the Board's statutory jurisdiction. It consists of private tracks...Private tracks constitute a narrow limited category of **rail operations**.

The track at issue is controlled and operated by the BNSF Railway Company ("BNSF") pursuant to an Industrial Track Operating Agreement with PSO[5]. 49 U.S.C. §10102(6)(B) defines "railroad" to include (Emphasis added):

> the road used by a rail carrier **or operated under an agreement**;

49 U.S.C. §10102(9)(A) defines "transportation" to include (Emphasis added.):

> A locomotive, car, vehicle, ...facility, **instrumentality**, or equipment of any kind related to the movement of passengers or property or both by rail...

This Court has made it clear that the term "instrumentality" includes track regardless of ownership, so that railroad track is included in term "transportation." *United States v. Baltimore & Ohio R. Co.*, 333 U.S. 169, 176, 68 S. Ct. 494, 498 (1948).

Even though the STB disclaimed jurisdiction over the track at issue the law is clear that states are still precluded from exercising jurisdiction in the face of the federal preemption. In *Cities of Auburn and Kent, Wa-Petition For Declaratory Order-Burlington Northern Railroad Company-*

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[5] All dispatching over the track is controlled from BNSF's operation center in Fort Worth, Texas.

Stampede Pass Line, STB Finance Docket No. 33200 (July 1, 1997), 2 S.T.B. 330[6] the STB stated:

> Petitioners complain that our decision in *King County* creates a regulatory void that Congress could not have intended. In such instances, according to the Cities, the states may impose their own oversight authority...As an example, petitioners maintain that states have residual regulatory authority over **spur** or switching tracks **that are excepted from our jurisdiction**...When sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove our authority over the entry and exit of these auxiliary tracks, **while still preempting state jurisdiction over them**...Thus, although **we may not regulate the construction and disposition of spur** and switching tracks, it is equally clear that **state and local authorities may not regulate those activities either..."**
> *Cities of Auburn and Kent, Wa.*, 2 S.T.B. 330 at 341, 342. (Emphasis added.)

See also *Fletcher Granite Company, LLC- Petition for Declaratory Order*, STB Finance Docket No. 34020 (served June 29, 2001) and *Flynn v. Burlington Northern Santa Fe Corporation*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000). In *Flynn* the Court noted at 1189:

> The STB has addressed 49 U.S.C. § 10501 and 49 U.S.C. § 10906 and concluded that Congress intended that neither the STB nor local authorities could

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[6] The decision may also be found at 1997 WL 362017.

> regulate the construction and disposition of spur and switching tracks, i.e. auxiliary tracks.

For purposes of federal railroad regulation, it has long been held that condemnation is construction.

> We agree with the court in Tampa Phosphate that the condemnation of right-of-way to construct a railroad line is "construction"... *Nicholson v. Missouri Pacific Railroad Company*, 366 ICC 69 (1982) at 71.

As a result neither state nor local authorities may regulate condemnation for and disposition of spur and switching tracks, i.e. auxiliary tracks.

In addition to condemnation of right of way being considered part of the construction process for railroads, this court has long held that it is also considered regulation. In *Cherokee Nation v. Southern Kansas Railway Company*, 135 U.S. 641, 10 S. Ct. 965 (1890) Congress had authorized the construction of a railroad across what was then the Indian Territory and is present day Oklahoma using federal eminent domain. The Cherokee Nation brought an action challenging the project on numerous grounds, including that the power of eminent domain could not be exercised in this manner. This Court disposed of this claim in the following language:

> But it is said that the objects for which the act of 1884 was passed are not such as admit of the exercise of the right of eminent domain. This contention is without merit. Congress has power to regulate commerce not only with foreign nations and among the serveral states., but with the Indian tribes...
> *Cherokee Nation v. Southern Kansas Railway Company*, 135 U.S. at 657, 10 S. Ct. at 971.

In *Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wis. 2000) the Court found that 49 U.S.C. § 10501(b) precluded condemnation of an existing track under state law stating:

> The Courts holds that condemnation is construction. In using state law to condemn the track, defendant is exercising control-the most extreme type of control-over rail transportation as it is defined in section 10102(9).
> *Wisconsin Central Ltd.* at 1013

Obviously, the City of Marshfield, Wisconsin is not a common carrier and the STB has no jurisdiction over it. None the less, the federal preemption still applied when the City sought to condemn a railroad track just as the preemption applies even though the STB has no jurisdiction over PSO.

In the case at bar possession and control of the track in question was turned over to BNSF in March of 1995. Not until October of 2004 did a state court hold a hearing on Willis' challenge to the taking of Willis' property with the Court's order not issuing until November 15, 2004.

PSO has always contended that the public use justification for condemning Willis' property was to create competition between BNSF and Union Pacific to drive coal hauling rates down. Since Willis challenged the public use justification of the taking, a state official had to adjudicate the public necessity of creating this competition between rival interstate common carriers. In a sworn affidavit BNSF attested that the existence of the track across Willis' property shifted "millions of dollars in annual revenues" between BNSF and Union Pacific.

However, this Court has long held that the promotion of railroad traffic and the creation of competition is regulation of railroad transportation. *Dayton-Goose Creek Ry. Co. v. United States*, 263 U.S. 456. 44 S. Ct. 169 (1924), *California v. Central Pacific Railroad Company*, 127 U.S. 1, 8 S. Ct. 1073, *Cherokee Nation v. Southern Kansas Railway Company, supra.*

Even the Oklahoma Court of Civil Appeals has held that the federal preemption provisions of the ICC Termination Act preempted all state economic regulation of rail transportation. See *Oklahoma Corporation Commission v. Burlington Northern and Santa Fe Railway Company*, 24 P. 3d 368 (Ok Civ App 2001).

As a result of the federal preemption codified at 49 U.S.C. § 10501, Oklahoma's railroad regulatory laws, pursuant to which PSO claims to have condemned Willis' property, are preempted and the Rogers County District Court's order of November 15, 2004 is void for lack of subject matter jurisdiction.

CONCLUSION

The decision of the Oklahoma Supreme Court establishes that under Oklahoma eminent domain law property may be seized and destroyed without any predeprivation hearing permitting the property owner to defend the property. In addition, that decision reflects a complete rejection of the federal preemption of the regulation of rail transportation. This decision ignores the prior decisions of this Court and clear federal statutes. Certiorari should be granted and the state decision reversed.

Respectfully Submitted,

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